

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE D. FORD,

Defendant-Appellant.

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UNPUBLISHED

April 26, 2007

No. 268539

Wayne Circuit Court

LC No. 05-008770-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of felonious assault, MCL 750.82, discharge of a firearm from a motor vehicle, MCL 750.234a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to 6 years and 4 months to 20 years' imprisonment for the assault with intent to do great bodily harm and felonious assault convictions, 2 to 4 years' imprisonment for the discharge of a firearm from a motor vehicle conviction, and 5 to 10 years' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to five years' imprisonment for the felony-firearm, second offense, conviction. We affirm, but remand to the trial court to vacate defendant's felonious assault convictions as violative of defendant's double jeopardy protections.

Defendant's convictions arise out of his firing of a gun toward a vehicle on August 1, 2005. Ade Ronell Beard was driving his Ford Taurus with Keanne Butler in the passenger seat, when the Taurus nearly collided with a gray Buick that defendant was driving. Defendant then pulled up next to Beard and accused him of trying to hit defendant's car. Beard and Butler told defendant that they were not looking for any trouble and Beard drove away. Thereafter, defendant held a gun outside his driver's window and fired shots at the Taurus. Beard suffered two gunshot wounds to the back of the head and Butler's right arm was struck. Beard lost consciousness, and his vehicle came to a stop when it collided with a Jehovah's Witness Kingdom Hall. Beard identified defendant as the shooter in a photographic lineup.

Defendant argues on appeal that the trial court erred by admitting at trial portions of recorded telephone conversations allegedly involving defendant. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 714 NW2d 506 (2005), lv den 476 Mich 863 (2006). The abuse of

discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den \_\_\_ US \_\_\_; 127 S Ct 1261; 167 L Ed 2d 76 (2007); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), clarification den 469 Mich 1224 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado*, *supra* at 388; *Babcock*, *supra* at 269. A decision on a close evidentiary question cannot be an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002).

Defendant contends that the prosecutor did not lay a proper foundation for the admission of the recorded telephone conversations in violation of MRE 901(a), which provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Further, MRE 901(b)(1) states that authentication may be accomplished by "[t]estimony that a matter is what it is claimed to be." Thus, if the prosecution showed that the recordings were what they were claimed to be, then they were sufficiently authenticated. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991), reh den 437 Mich 1254 (1991).

Defendant asserts that the prosecutor did not authenticate the voice on the recordings as belonging to him. Corporal Emanuel Johnson testified that an inmate is required to use his inmate number when placing a telephone call and that an inmate may place calls only to those numbers listed on the inmate's particular call list. Corporal Johnson further testified that the 183 recorded telephone calls at issue, portions of which were played for the jury at trial, were recorded under defendant's inmate number. Thus, although no testimony positively identified the voice on the recordings as defendant's, because the prosecutor presented other evidence indicating that the recordings were what the prosecutor claimed them to be, they were sufficiently authenticated. MRE 901(b)(1); *Berkey*, *supra* at 52. Defendant's argument that another inmate could have used his inmate number to call telephone numbers listed on his call list is purely speculative. Accordingly, the prosecutor established a proper foundation for the admission of the recordings.

Defendant also contends that the admission of the recorded conversations confused the jury, contrary to MRE 403, because the jurors expressed to the trial court that they could not understand much of what was being said on the recordings. Although some jurors expressed difficulty understanding what was being said on the recordings, another juror stated that some portions of the recordings were understandable while others were not. That juror expressed a desire to listen to the recordings rather than not hearing the evidence at all.

The trial court did not abuse its discretion by allowing the jury to listen to the recordings despite apparent difficulty in understanding some portions of the recordings. The fact that some segments of the recordings were difficult to understand was relevant to the weight that the jurors accorded the recordings rather than their admissibility. Proposed evidence need not tell the whole story of a case or be free of weakness, but if it meets the minimum requirements for admissibility, it is up to the finder of fact to weigh it properly. *Berkey*, *supra* at 40.

Defendant next argues that he was entitled to introduce the complete recordings of the telephone conversations pursuant to the MRE 106 rule of completeness. Because defendant did not preserve this issue by raising it in the trial court, our review is limited to plain error affecting

defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

MRE 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This rule applies only "if defendant sought, but was denied, permission to have a complete writing or recorded statement introduced. In other words, MRE 106 does not have any bearing on the admissibility of the testimony that the prosecution introduced, except that it might have allowed defendant to supplement the prosecution's proofs." *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002), lv den 468 Mich 859 (2003).

Here, the rule of completeness was not violated because defendant did not request in the trial court to admit the remaining recorded conversations that the prosecutor did not seek to admit. Rather, he sought to exclude the recordings in their entirety by arguing that "those tapes should not be admissible on the basis that they are just little snippets of total conversations and they are taken completely out of context . . . ." Accordingly, the rule of completeness did not apply and no plain error occurred.

Although not raised by defendant on appeal, we note that his convictions and sentences for both felonious assault and assault with intent to do great bodily harm less than murder violate his protections against double jeopardy. See *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995), lv den 453 Mich 919 (1996) (double jeopardy is offended when convictions for felonious assault and assault with intent to do great bodily harm are based on the same conduct). Although the trial court indicated at sentencing that it did not intend to sentence defendant on his felonious assault convictions, the judgment of sentence nevertheless indicates that the trial court sentenced defendant for those convictions. We therefore remand this case to the trial court to vacate defendant's felonious assault convictions and sentences.

Affirmed, but remanded to the trial court with instructions to vacate defendant's felonious assault convictions. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello